United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILHELM WILHELMSEN,
Libelant and Appellee,
v.
THE BARK "THIELBEK,"
Knohr & Burchard, Nfl.,
Claimants and Appellees,
THE PORT OF PORTLAND,
Respondent and Appellant.

KNOHR & BURCHARD, Nfl.,
Libelant and Appellee,
v.
THE "THODE FAGELUND,"
Wilhelm Wilhelmsen,
Claimant and Appellant,
THE PORT OF PORTLAND,
Respondent and Appellant.

No. 2769.

On Appeal from the District Court of the United States for the District of Oregon

Petition for Rehearing

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In the brief on behalf of the appellant, The Port of Portland and in the oral argument appellant sought a reversal of the decrees of the District Court in these causes upon several grounds:

I.

The appellant claimed that the cause of the collision was a mistake in judgment on the part of Nolan, the pilot on the "Thode Fagelund," and not negligence.

II.

The appellant claimed that the amendment to its charter by a vote of the people of The Port of Portland submitted by the initiative and adopted by the voters was void and that on this account The Port of Portland had no power to engage in the business of pilotage or in the business of towage and having no power it could not employ a pilot, and therefore was not bound by the acts of negligence on the part of the pilot Nolan.

III.

The Port of Portland claimed that its liability to the "Thode Fagelund" and its owners is limited by the act under which this service was performed, and that no sum can be recovered against it for the negligence of pilot Nolan either by the "Thode Fagelund" or by its owners in excess of the statutory limitation, $10,000.00.

IV.

The Port of Portland claimed that the Workman case, upon the authority of which rests the opinion rendered in this court, is not applicable.

The first question is decided against the appellant in no uncertain terms in the opinion of this court.

The second contention on behalf of this appellant is indirectly if not directly passed upon by this court. The third proposition for which this appellant contended is mentioned in the statement of the case by your Honors, but at no other place in the opinion is it referred to. The fourth contention of the appellant is decided adversely by your Honors.

The case is of such great importance to the appellant and of such interest to the public at large that the appellant feels constrained to ask your Honors to reconsider this matter and to pass directly and positively upon the proposition numbered III *supra*, and to reconsider in connection therewith the Workman case, to the end that this appellant may know not only what its liability is but also the extent of its liability and the principles on which this liability is predicated and may intelligently adjust its business to accord with your Honors' decision.

LAWS REGULATING PILOTAGE

At the time this accident occurred the State of Oregon had a general law regulating shipping and navigation, including pilotage. This act is contained in Title XXXVIII, Chapter 4, Volume II, L. O. L., pages 1936 and following. The first division

of this act regulates pilotage on the Columbia River bar and on the Columbia and Willamette Rivers. The other subdivisions have no bearing upon the matters before your Honors. Under this act pilot commissioners for the bar and river pilot grounds are appointed by the Governor, and such commissioners are given very ample powers, and they are also required to discharge many and in some respects complex duties. Among other duties they are to discharge is that of licensing pilots for the bar service and pilots for the river service. They have power to hear and determine all complaints against any of said pilots, to make and alter rules for the government of such pilots and for the maintenance of an efficient pilot service on the pilot grounds, and to enforce the same by any lawful and convenient means, including suspension or removal of any pilot. They also must keep a registry of each vessel crossing the Columbia River bar and they are placed in charge of a pilot schooner belonging to the State, and are required to provide pilots with an adequate vessel on which to ply their vocation as bar pilots. *The duties and rights of pilots are also prescribed by this act and the liability of a pilot for his negligence or incompetence is also expressly declared.* Section 5179 of this act authorizes a licensed pilot to take charge of any sea-going vessel over 100 tons of burden, not then in charge of a pilot, anywhere upon the pilot grounds for which he is licensed, and to navigate her upon and over the same, and demand and receive therefor the compensation allowed by

law. Section 5180 fixes the compensation for the pilot service on the bar. Section 5185 makes the master, owner and consignee or agent of the vessel liable to the pilot jointly and severally for any sum due him for piloting or *offering to pilot* such vessel. Nothing is said positively in the act in regard to whether the pilotage law is or is not compulsory in its nature, but Section 5181 of the same act, which provides for compensation for river service, also provides that it shall be optional with the master or person in charge of any vessel whether he accepts or demands the service of any river pilot, thus declaring that river pilot service shall not be compulsory, and by implication it would seem that the act contemplates that bar pilot service shall be compulsory.

This law was in full force and effect in 1908 when the charter of The Port of Portland was amended by initiative petition and the vote of the legal voters of the said corporation. At the following session of the legislature in 1909 a general law was enacted by the legislature authorizing the incorporation of municipal corporations, designated as ports, in counties bordering upon bays or rivers navigable from the sea or containing bays or rivers navigable from the sea. Under this act, III L. O. L., Section 6121, subdivision 5, such corporations are given power to establish, maintain, and operate a tug boat and pilotage service, to operate steam tug boats and steam and sail pilot boats, to collect charges for vessels employing such tugs so

operated and to collect charges for pilotage services rendered by *employees of the corporation.* This act indeed grants generally the powers granted by the initiative act under which the powers of The Port of Portland were enlarged at the election of 1908, and, indeed, contemplates that The Port of Portland may reincorporate under the provisions of this act. It will be noted that under the general law regulating pilotage the State fixes the compensation for piloting a vessel. The State declares the powers and authority of the bar pilot, gives him a right to sue for compensation for his services, whether he pilots the vessel or offers to pilot the same, and the general law makes the pilot liable for any loss or injury due to his negligence or incompetency; it also requires of him a bond and makes the sureties upon his bond liable to the extent of the bond for loss or injury by reason of his negligence or incompetency. Under the law of 1909 above referred to there is no provision for licensing pilots, for regulating pilots or for removing pilots. Under the initiative act of 1908 the powers of The Port of Portland are enlarged. No power is given The Port of Portland to license pilots, to regulate pilots, to control pilots, or to discharge pilots, and under neither of these acts are the duties of pilots prescribed. *These matters were left to the general law in force at the time that the charter of The Port of Portland was amended.* In addition to pilots licensed by State authority there were at such time also pilots licensed by authority

of the United States and possibly pilots on the Columbia River licensed by authority of the State of Washington, but as Nolan was not a licensee of either the United States or the State of Washington it is unnecessary to consider any laws except those of the State of Oregon and of The Port of Portland. The purpose of the general law above referred to, though it is not stated in the act, is to establish and maintain an efficient pilotage service on the Columbia bar and on the Columbia and Williamette Rivers. The purpose of the initiative act amending the charter of The Port of Portland is clearly to enable The Port to establish and maintain an efficient towage and pilotage service between its corporate limits and the open sea, including the Columbia River bar. All these acts therefore are designed for one purpose, and none of the acts undertakes to repeal any provision in any of the other acts. The pilotage law, therefore, Title XXXVIII, Chapter 4, II L. O. L., is now and was at the time this accident occurred in full force and effect, and the rights and duties and liabilities of pilots are now and were at that time fixed and determined by the general law and not by the initiative act of The Port of Portland or by the general act establishing ports, for in neither of these acts is anything said in regard to the rights, powers, or liabilities of pilots, or in regard to the licensing, regulation, control, discharge, or suspension of pilots.

The Port of Portland therefore could not act as

a pilot. If it employed a pilot it could discharge him from its service but could not take away his powers as pilot. These were granted by the State and could be taken away only by State authority. That The Port of Portland was not employed to pilot a vessel is shown by the act itself, for the act provides (Section 6106) that The Port may operate steam and sail pilot boats and steam tug boats and collect charges for vessels employing the tugs operated, and also *collect charges for pilotage services rendered by employees of The Port;* and Section 6108 provides that if the vessel be injured by reason of the fault of the tug it may recover damages, or if it be injured by reason of the negligence or incompetency of the pilot it may recover damages, but in no case shall The Port be liable for more than $10,000.00 of the loss or injury. In fine, the law clearly contemplates that when the pilot goes upon the vessel he takes charge of the vessel under the power conferred on him by the statute (Section 5179); his powers and authority are defined by this statute; and with such powers and with such authority The Port of Portland cannot interfere.

The proper construction, therefore, to be placed upon the initiative act is, so far as pilotage is concerned, that The Port of Portland, in order to establish and maintain an efficient pilotage service between its boundaries and the open seas, should operate steam or sail pilot boats upon the Columbia bar pilotage grounds in the same manner as under Section 5175 the Board of Pilot Commis-

sioners were enjoined to provide the pilots with an adequate vessel in which to ply their vocation as bar pilots, and, to still further make efficient such pilotage service, The Port should keep in its employment a sufficient number of licensed pilots, to the end that any vessel desiring to trade within the boundaries of The Port might have efficient pilotage service at all times.

Seemingly at the time this act was passed the towage service upon the river was unsatisfactory. The pilotage service upon the river and upon the bar were likewise unsatisfactory. The compensation which pilots would earn was precarious, depending entirely upon the number of vessels which they might be employed to pilot and from which they might receive compensation. Therefore The Port, to meet these conditions, to apply a remedy which would acomplish the end desired, was authorized to employ these pilots. The effect of this employment is that the pilots have steady employment and remuneration, and that the constant remuneration which they receive from The Port is such that a sufficient number of persons are thereby induced to qualify themselves to act as pilots and to discharge the duties of pilots. In return for this steady employment and steady remuneration under the authority of the law, the pilot, by accepting employment from The Port of Portland, gives to The Port of Portland his right to the statutory fees to which he would be entitled for his services rendered vessels piloted by him. The law recognizes

this contract and enables The Port to enforce in its own name the collection of these fees, and enables The Port to contract, if it so desires, that the pilot will pilot the vessel for a less compensation than that fixed by law, thereby benefiting pilot, ship, and the community, and effecting the object desired. The result is that the vessel employs, not The Port of Portland but employs the pilot, who when on the vessel is in charge and is exercising the authority and performing the duties prescribed by the general law. The vessel agrees upon the compensation to pay, not with the pilot but with The Port, and pays the compensation to The Port.

The Port does not claim that there is any decision directly in point on this proposition but does claim that the rights of the parties should be determined by analogy and enforced according to the real contract between the parties based upon the statutory provisions of the State. Furthermore, the vessel gains, for it retains all its rights against the pilot, that is to say unlimited liability on the part of the pilot, and it has the recommendation of the City as to the competency and character of the pilot as well as the recommendation of the Board of Pilot Commissioners, and it has in addition thereto a guaranty on the part of The Port of the competency and fitness of the pilot, limited, however, so far as the guaranty is concerned to the sum of $10,000.00.

It is a general principle universally recognized by the courts that public officers are not liable for the negligence of subordinate officers or agents

whom they are bound by law to employ, in the absence of negligence or other wrong on their own part, and Mr. Thompson in his work on negligence, Section 6378, says in such cases the doctrine of *respondeat superior* does not apply but such subordinate officers or agents are deemed independent officers of the law and answerable to the public for the proper discharge of the duties of their offices or agencies, and liable to the State in criminal or other lawful proceedings for nonfeasance in that behalf, and also answerable to individuals for misfeasances whereby such individuals are specially damaged.

A case somewhat analogous to the case at bar is found in *Guy v. Donald,* 203 U. S. 399. There the pilotage law of the State of Virginia was under the consideration of the Supreme Court. From the extracts contained in the opinion it will be seen that the pilotage law of the State of Virginia is very similar to that of Oregon. There was a voluntary association of pilots known as the Virginia Pilotage Association. This Association was recognized by the pilotage law of the State and also by the rules of the Board of Pilot Commissioners. This Association made contracts with ships for pilotage. The fees earned were paid to the Association upon bills made out by the Association and went into a common fund from which the Association paid the expenses of the business, including office rent, and divided the net profits among the pilots according to the number of days the several pilots were upon

the active list. The owner of a steamer sued the Virginia Pilot Association for the negligence of Guy, one of their number. The Supreme Court held that the members of the Association were not liable. The principle upon which the case turned is that inasmuch as the Association could not control the act of the party who was guilty of negligence, its members could not be held for the negligence. The court says:

> "It is quite plain that the Virginia code contemplates a bond of mutual personal liability between the master of a vessel and the pilot on board. If we imagine such a pilot performing his duties within sight of the assembled Association he still would be sole master of his course if all of his fellows passed a vote on the spot that he should change and shouted it through a speaking trumpet he would owe no duty to obey but would be as free as before to do what he thought best."

These principles are equally applicable to the case at bar. If pilot Nolan had been performing his duties in sight of the Commissioners of The Port, if indeed these commissioners had been on board the ship, if they at that time had unanimously declared that he should change his course and so instructed him, if they threatened to discharge him and actually were to undertake to discharge him while he was in charge of the vessel, he would owe no duty to them to obey. He would be as free as

before to do what he thought best, and it be his duty to do what he thought best, for he would be discharging the duties imposed upon him by the general laws of Oregon under which he was licensed and authorized to act, and The Port had no power to control such action.

The principle upon which the employer is held liable for the negligence of the employee is that the employee is discharging the duties which the employer has undertaken to discharge and that the employer has entrusted a part of this work to another, but the law does not recognize that The Port of Portland could undertake these duties. It does recognize that a qualified employee of The Port could undertake to and perform these duties if licensed by the State. Therefore in discharging his duties *the employee is not discharging the duties* of or doing the work *of the employer but is doing his own work entrusted to him by statute, work which the employer could not do and which it is not authorized by law to do.*

THE WORKMAN CASE.

In your Honors' opinion, page 9, it is said that this cause is controlled by the *Workman* case. In the *Workman* case a bark was moored to a dock and while so moored was struck and injured by the steam fire-boat "New Yorker," owned by the City of New York. The fire-boat had been called to aid in extinguishing a fire in a warehouse. The owner of the bark sued the City of New York, the

fire department of the city and the person in charge of the navigation of the fire-boat at the time of the collision. The owner of the bark therefore occupies the same position as the owners of the "Thielbek" and the "Ocklahama," not the position at all of the owners of the "Thode Fagelund." The Supreme Court held that as the bark was injured through no fault of its own, as the fire-boat was in discharge of its duties and was owned by the City, the City was liable for the damages sustained. Seemingly the libel was dismissed as to the fire department, and this part of the judgment and decree of the District Court was seemingly not affected by the appeal.

In the *Workman* case the bark occupies toward the fire-boat the same position which the "Thielbek" and "Ocklahama" in the case at bar occupy toward the "Thode Fagelund." The injury did not result from any negligence or wrong on the part of the bark in the one case nor from any negligence or wrong on the part of the "Thielbek" and the "Ocklahama" in the case at bar, and it may therefore be conceded that if The Port of Portland is liable for more than $10,000.00 it is liable to the "Thielbek" in this sum, but as the "Thode Fagelund" does not occupy the same position toward The Port which the bark occupied to the fire-boat in the *Workman* case, it would seem that the *Workman* case should not be considered as decisive of the case at bar. In this connection your Honors' attention is directed again to the law of the State of Oregon

under which The Port of Portland is organized, and in connection therewith your Honors' attention is called to the decision of the Supreme Court in the *Oregon Railway & Navigation Co. v. The Oregonian Railway Co.*, 130 U. S. 1, wherein the Supreme Court lays down broadly the principle that the powers of corporations are such and such only as are conferred on them by the acts of the legislature of the several states under which they are organized, and that all parties contracting with such corporations must recognize this limitation upon the powers of the parties with whom they contract. Here The Port of Portland was not engaged in piloting the "Thode Fagelund"; it could not legally pilot this vessel and had no power to undertake this duty for the law of its incorporation gave it no such power. In the *Workman* case the court holds that in admiralty the vessel is the active agent. It therefore is held liable *in rem* for injuries sustained through its fault, though of course the fault of the vessel is really due to the negligence of those who have charge of her. Admiralty, however, personifies the vessel as it were, makes the vessel liable for the damage done and the owners of the vessel and those having charge of her navigation liable as it were indirectly, that is to say, liable for the damage done by the vessel. Upon this principle the court in the *Workman* case held that the fire-boat of the City was guilty of negligence, and that the owner of the fire-boat and those having charge of her navigation were, because

of their relation to the fire-boat, responsible for the negligence of the fire-boat. In other words, that the negligence of the fire-boat should be imputed to the owner and those in charge of her navigation. Public policy forbade the court from condemning the fire-boat, but such public policy did not extend to the owner or to the party in charge of her navigation, and therefore a recovery was had against the owner and against those in charge of the navigation of the fire-boat. In the case at bar, however, the "Thielbek" was not found to be guilty; the "Ocklahama" was not found to be guilty and those in charge of the "Thielbek" and those in charge of the "Ocklahama" were found to be guiltless. No negligence, therefore, having been found against the "Ocklahama" or against the "Thielbek" no negligence can be imputed to The Port of Portland by reason of its ownership of the tow-boat. The negligence found by your Honors is the negligence of Nolan as a pilot discharging his duties as a pilot under the laws of the State of Oregon, not the negligence of the City in employing him, for the uncontradicted evidence offered on behalf of the "Thode Fagelund" is that Nolan was licensed by State authority; that he was a pilot of experience and standing and of good reputation for care, so much so that it was shown that, when discharged by The Port of Portland, he was employed by the United States as pilot of the dredge "Chinook." The Port therefore is not charged with a failure to exercise due care in recommending Nolan or in employing Nolan for

the "Thode Fagelund," and The Port submits that it discharged its full duty toward the "Thode Fagelund" in this particular.

THE LIMITATION.

Formerly it was held that a ship owner was an insurer and that the owner was responsible for loss or damage however arising, but responsible only to those with whom he contracted for the carriage of goods or to those injured by his actual carelessness in the navigation of his ship. The law in this particular has been much modified. A ship owner may now limit his liability either under the English or the American law. Such limitation may be effected by contract.

Maclachlan in his Law of Merchant Shipping, Fifth Edition, page 603, says:

> "It is now, however, quite usual for shipowners to stipulate that they shall not be liable for losses by the excepted perils even when due to their negligence or that of their servants, or directly to except loss by such negligence, and there is no rule of English law which prevents due effect being given to these stipulations," citing *Steel v. State Line,* 3 App. Cas. 72, 88.

And again on page 613 the author says:

> "We have seen that the exceptions in the contract do not protect the shipowner against claims for loss or damage due to the excepted

> causes, when brought about by the negligence of himself or his servants; but that he may protect himself against the operation of this rule by stipulating, expressly and unambiguously, that he will not be responsible for such negligence. Clauses having that object are now common, but they vary greatly in their language."

In the foot note it is said, page 613:

> "Exemptions from liability for loss 'from any cause,' or under 'any circumstances whatever,' or similar clauses, have been held to exempt railway companies, carriers of passengers' luggage by sea and the grantors of free passes from responsibility for the negligence of servants," citing *McManus v. L. & Y. Ry. Co.,* 4 H. & N. 327; *Ashendon v. L. & B. Ry. Co.,* 5 Ex. D. 190; *Taubman v. Pacific Steam Nav. Co.,* 26 L. T. 704; The Stella, P. 161.

The same author, page 614, says:

> "Sometimes, as where the Harter Act is incorporated in the contract, the shipowner is exempted from liability for damage or loss resulting from faults or errors in navigation or in the management of the vessel,"

and on the same page a distinction is drawn between the negligence of a servant on board the ship which was not carrying the cargo injured and that of a servant on board the ship which was carrying

the cargo damaged, holding the ship owner liable in the one case and not in the other, though the contract of carriage contained an exception of the negligence of servants, and in *Westport Coal Co. v. McPhail,* 2 Q. B. 130, cited by the author on page 615 it is said that where the master of the ship was also a part owner, and a bill of lading excepted the negligence and default of master in navigating the ship and the cargo was lost by the stranding of the ship through his negligence, as the negligence was entirely in his (master's) sphere of duty as master he was protected as owner by the exemption.

Many statutes have been enacted by Congress whereby owners of ships may limit their liability. Note the limitations found in Sections 4281, 4282 and 4283 Revised Statutes; Section 4287 preserves the remedy, however, over and against master, officers or seamen though the owner's liability is limited.

By the act of February 13, 1893, commonly known as the Harter Act, Section 3, if the owner of a vessel transporting merchandise shall exercise due diligence to make the vessel in all respects seaworthy, properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterer shall become or be responsible for damage or loss resulting from faults or error in navigation or in the management of said vessel and so forth. Owners of vessels also may limit their liability by surrendering their vessel when the damage or loss was occasioned through her fault, provided that the

owner himself is not guilty of any personal negligence. In ordinary business transactions persons may limit their liability by contract. The limitations above mentioned under the Revised Statutes are given by statute, and it is not necessary that such limitation be inserted in the contract.

The Port of Portland contends that it had a contract with the "Thode Fagelund" and its owners whereby it was agreed that it should supply a licensed pilot to pilot the "Thode Fagelund" over the bar pilotage grounds; that such pilot should be a man of good character and standing and competent to discharge the duties, and that the ship should pay for the services rendered by such pilot a certain sum agreed upon and fixed by the pilotage rates or charges theretofore established and made public in pursuance of law; that this pilot should be one of its employees and that it would answer for his negligence if he should be guilty of negligence, to the extent of $10,000.00 and no more. The Port contends that this contract was one which it had a right to make, one which the law under which it was acting required it to make, and that the *limitation was an integral part of the contract.* The law under which The Port of Portland was acting was a public law. The rates or charges for pilotage which it would demand were published. Of these public acts the owners of the "Thode Fagelund" are charged with full notice and The Port contends that the "Thode Fagelund" and its owners are bound by this contract. It contends that the con-

tract is not in violation of any rule of admiralty. The contract takes from the ship and from its owners no right or remedy which it or they would have under the admiralty law. The ship and its owners reserve the remedy against the pilot for his negligence. It claims that its liability to the extent of $10,000.00 is in the nature of a guaranty, on its part, that the pilot was competent and would discharge his duties, but it claims also that no rule of admiralty makes it answerable for negligence on the part of the pilot discharging the duties imposed upon him by the statute law of the State and by the rules of admiralty. The *Workman* case, resting upon the principle that the offending vessel is liable under the rules of admiralty for any injuries sustained by the innocent vessel and that negligence on its part may be imputed to its owners, can have no application to a case of this character in so far as the "Thode Fagelund" is concerned.

In conclusion, we as proctors for The Port of Portland would not have your Honors think that we do not recognize that one decision of the Supreme Court of the United States on any question, so long as it stands unreversed, is binding upon inferior courts. The *Workman* case is binding upon your Honors where the facts involved are the same or similar to those involved in that case, or where the principle upon which the liability is predicated is the same. So close, however, was that case regarded by the Supreme Court that the court was almost equally divided in regard to the responsibility of

the City of New York, but the case, we admit, is an authority for what it decides upon the facts presented therein. We respectfully submit, however, that it is not authority upon the facts presented upon the record in these causes.

Respectfully submitted,

TEAL, MINOR & WINFREE,
ROGERS MAC VEAGH,
Proctors for Petitioner,
The Port of Portland.

I, WIRT MINOR, do hereby certify that I am one of the proctors for The Port of Portland, respondent and appellant in the above entitled cause and petitioner for re-hearing therein; that I prepared the within and foregoing petition and in my judgment the same is well-founded; and that said petition is not interposed for delay.

WIRT MINOR